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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ANGEL ROMERO, Defendant and Appellant.	A123755 (Sonoma County Super. Ct. No. SCR524357)

A jury convicted defendant Jeffrey Angel Romero of robbery and found that he personally used a handgun during the commission of the offense. Defendant contends it was error for the trial court to admit (1) an unidentified witness's hearsay statement that described the suspect's vehicle and direction of travel away from the crime scene; and (2) identification testimony from the victim, who identified defendant at a single-person showup shortly after the robbery and in the courtroom during trial. Defendant also argues the court erroneously relied on his denial of guilt as an aggravating factor in sentencing, and that defense counsel's failure to object to the use of defendant's denial of guilt was ineffective assistance of counsel. We find no prejudicial error and therefore affirm.

BACKGROUND

Defendant was tried twice. The first jury found him guilty of carrying a loaded firearm in a public place, a misdemeanor, but deadlocked on robbery. The court declared

a mistrial and deferred sentencing on the misdemeanor until after retrial. This background discussion is taken from the evidence at defendant's second trial.

Prosecution Case

Robert Ramos was working at the Sebastopol Valero gasoline station on the afternoon of November 11, 2007. Sometime before 3:00 p.m. he transferred all but approximately $400 from the store's cash register to its safe. Around 3:00 p.m., a bearded, dark-haired white man entered the store and told Ramos to empty the cash register. The man had a gun in his left hand. He was wearing jeans, a gray sweatshirt, and a beanie. At trial, Ramos identified defendant as the robber.

Ramos took the money from the register in stacks of $1, $5, $10, and $20 bills, put them in a white plastic bag supplied by the robber, and handed him the bag. The robber cocked his gun and ordered Ramos to get on the ground and count to 30 "or else he was going to shoot my head off."

A customer entered the store while Ramos was still counting. The customer asked Ramos if he had been robbed and told him to call 911. Ramos asked the customer if he had seen where the robber went and what he was driving. The customer told Ramos that the robber drove off in a "white half ton" and pointed south down Highway 116. The customer left before the police arrived and was never identified or located.

Sebastopol Police Sergeant Michael Nielsen responded to a report of a robbery in progress at the Valero gas station. The dispatcher described the suspect as a white male adult with facial hair, 25 to 30 years old, wearing a gray hooded sweatshirt and a beanie. While Sergeant Nielsen was en route, the dispatcher said the suspect fled south on Highway 116 in a white half-ton pickup. Nielsen spotted a male driving a white pickup truck southbound on 116 about four miles from the gas station, and pulled him over.

Defendant was wearing a red shirt and blue jeans. He complied with police orders to get out of the truck and approach the police car. Sergeant Nielsen told defendant that he was investigating a robbery. Defendant asked how long the stop was going to take

because he needed to get home to a sick child. As a deputy sheriff approached the pickup truck to search it, defendant told Sergeant Nielsen that he was on his way to a shooting range and that he had a gun in the car.

The sergeant saw the gun on the floor behind the driver's seat, partially hidden by a sweatshirt. There were eight .45 cartridges in the magazine, none in the chamber, and the slide was forward. The gun was registered to defendant.

Sergeant Nielsen also found a white plastic bag wedged between the two front seats. The bag contained $308, comprised of six $20 bills, six $10 bills, nineteen $5 bills, and thirty-three $1 bills. A box of .45 caliber ammunition missing eight cartridges, a pistol case, and a gunlock were found beneath the driver's seat. Police did not find any shaving equipment or disguises in the truck.

The police dispatcher called Ramos and told him the police wanted him to make an identification. The dispatcher said "Don't worry. We have arrested the guy. We think we got him, and he had a gun with him."[1] Ramos was reluctant to leave the gas station unattended, but the dispatcher said it was an emergency and asked him to "go by real quick, make an identification, and we will bring you back to your gas station."

Sergeant Ken Troutfetter arrived at the Valero station at 3:05 p.m. and spoke with a scared and shaken Ramos. At 3:43 p.m., he escorted Ramos to the intersection where Sergeant Nielsen had stopped defendant for an in-field identification or "showup." Troutfetter advised Ramos he was under no obligation to identify the suspect and that the suspect might have changed his clothing.

Three or four police cars were there when they arrived. Defendant was handcuffed and standing between two uniformed police officers, about 20 feet down the road from his white pickup truck. Sergeant Troutfetter and Ramos drove by very slowly. Ramos said defendant's age, height, and physical appearance matched the robber's,

[1] Ramos testified that he did not know the suspect was apprehended with a gun until after the showup procedure.

except the robber had a full beard and the suspect did not have facial hair. Ramos had no doubt about his identification. Ramos was shown an olive-colored sweatshirt that he said looked like the one the robber wore, even though Ramos had told the dispatcher and written in a statement to police that the robber was wearing a gray sweatshirt. Although defendant has facial acne, Ramos did not report that to the dispatcher or police.

Later at the police station, Ramos was shown a handgun and identified it as the one used by the robber. At trial he testified that the cash register contained mostly smaller bills at the time of the robbery, and he identified a photograph of the cash recovered from defendant—which was comprised of more smaller denomination bills than larger—as that taken from the register during the robbery. Three usable fingerprints were recovered from the plastic bag. Two were identified as from defendant's right middle and ring finger. The third lacked sufficient detail to establish it was defendant's, but enough to conclude it was not Ramos's.

Defense Case

Defendant worked as a master auto mechanic and repaired cars on the side at his house. His wife, his father, a former landlord, and a friend testified that defendant did the auto repair jobs in addition to his regular job.

Big Five Sporting Goods employee Bryan Jones testified that a customer purchased a box of Remington .45 U.M.C. automatic ammunition, the same kind that was found in defendant's truck, from the Santa Rosa store in Coddingtown Mall on November 11, 2007.

William Souza operates the Circle "S" Shooting Range about 10 miles west of Petaluma. His records showed that defendant and his father used the shooting range on November 3, 2007. Defendant's father also testified that he and defendant went to the gun range on November 3, and that defendant shoots with his right hand. The Friday before defendant's arrest he did a brake job on his sister's car, for which she paid him cash.

Danya Parr was defendant's landlord in Hayward for about five years, until he moved to Petaluma a year before the arrest. Parr testified that defendant "always" worked on people's cars, including Parr's, although she never saw him get paid and she herself only paid him for parts.

Defendant's friend Joseph Crespin once accompanied defendant to a shooting range in San Leandro. Crespin also testified that defendant shoots with his right hand. Defendant worked on Crespin's car, for which Crespin paid cash, and he often worked on other people's cars.

Alicia Romero, defendant's wife, testified the couple had no financial problems at the time of defendant's arrest. Before they moved to Petaluma she had gone with him to a shooting range more than once. She testified that defendant shoots with his right hand. On the morning of his arrest, defendant was planning to deposit his paycheck at the bank. Alicia gave him about $300 he had earned from side jobs, including about $200 from the repair to his sister's car the previous day. She put the cash in a white plastic bag because it was too bulky for his wallet. There were some $5 bills, some $10's, and some $20's, but she did not count the money and did not know the exact amount. Defendant was going to deposit the cash and go to the gun range.

Defendant testified that he had gone to shooting ranges a few times, including on November 3, 2007, and that he fires with his right hand. The Circle "S" was the only gun range he has frequented in the Sonoma County area. On the morning of November 11, he intended to go to the shooting range for a couple of hours and then deposit cash from car repair jobs into his bank account. His son had a fever the night before.

When defendant left the house he took his gun and the white plastic bag of cash to deposit. He intended to go to the bank after the shooting range because he needed some of the cash for gas and admission to the range. He needed some ammunition, so he went to North Bay Firearms, a combined gun shop and shooting range in Rohnert Park, to purchase it because it is not sold at the Circle "S." When he got there it was closed. He

had seen listings for gun shops in Santa Rosa in the yellow pages, so he drove to Santa Rosa and used a gas station pay phone to locate a gun shop. Most of them were closed on Sundays, but another customer directed him to the Big Five Sporting Goods store in the Coddingtown Mall. Defendant bought gas and went to the Big Five.

After making his purchase, he returned to his truck in the parking lot and unlocked and loaded his gun to make sure he had bought the right ammunition. When a car pulled in next to him, he put the gun down behind his seat and asked the driver if there was a shooting range in the area. The man said there was one in Sebastopol. Defendant drove to Sebastopol and stopped at a market to ask for directions. The man he spoke to there said he only knew of the North Bay Firearms range. Since he knew it was closed, defendant got directions back to Petaluma. He was driving back through Sebastopol on Highway 116 when he was pulled over by the police. Defendant denied stopping at or robbing the Sebastopol Valero station.

The jury found defendant guilty of robbery with personal use of a firearm. He was sentenced to the three-year middle term for robbery and 10 years for the firearm use enhancement. This appeal timely followed.

DISCUSSION

I. *The Admission of Hearsay Evidence Was Error, But Not Prejudicial*

The People moved in limine to admit the unidentified Valero customer's statement to Ramos that the robber left the scene driving south in a white pickup truck. The court granted the motion and, over defendant's objection, allowed the People to introduce the statement for the nonhearsay purpose of explaining why the police stopped defendant's vehicle.[2] At trial, Ramos testified that the unidentified customer told him the robber was "headed southbound in a white half ton" pickup truck. Defendant contends the statement was inadmissible hearsay and was prejudicial. While we agree the statement was

[2] The statement was also admitted into evidence in defendant's first trial.

inadmissible hearsay, the record does not demonstrate a reasonable probability that defendant would have obtained a better result at trial had it been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The People argue that the declarant's statement was properly admitted for the non-hearsay purpose of explaining why the police stopped defendant's truck.[3] We disagree. Evidence, whether hearsay or not, is inadmissible unless it is relevant. (Evid. Code, § 350.) "To be relevant and therefore admissible, evidence must tend to prove or disprove 'a disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.)" (*People v. Price* (1991) 1 Cal.4th 324, 417.) Here, because defendant did not claim that his detention was illegal, Sergeant Nielsen's reason for stopping defendant's truck was not relevant. It had no consequence to the determination of any disputed issue.

The cases cited by the People do not support their contention that the testimony was admissible because it was offered for a nonhearsay purpose. In *People v. Turner* (1994) 8 Cal.4th 137, an informant testified about statements allegedly made by the defendant in a jailhouse conversation. Our Supreme Court held the informant could also testify about hearsay statements made by a third participant in the conversation, Scott, because those statements were admissible to give context and meaning to the defendant's

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[3] At trial, the prosecutor also asserted that the statement was admissible as a spontaneous statement. The court did not rule on that assertion and the People do not repeat it on appeal. In any event, the assertion has no merit. There was no showing that the declarant uttered the statement spontaneously, while " 'under the stress of excitement caused by the perception.' " (*People v. Morrison* (2004) 34 Cal.4th 698, 718.) " 'The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.] [¶] The basis for this circumstantial probability of trustworthiness is "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief." ' " (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

statements. Because the defendant's contributions to the conversation were relevant to the issue of his guilt and Scott's statements provided context and meaning, Scott's statements were properly admitted for a relevant, nonhearsay purpose. In *People v. Mayfield* (1997) 14 Cal.4th 668, 750-751, similarly, a witness was properly allowed to testify that he told police the defendant had a gun because whether the arresting officer knew that the defendant might have been armed was relevant to whether he used excessive force when making the arrest. Here, in contrast, Officer Nielsen's knowledge that the robber was seen driving away in a white truck was not relevant to any disputed issue.

More on point is *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 (also relied on by the People), where the prosecution introduced incriminating phone calls made to defendant's phone moments after he was arrested. The caller, unaware that she was speaking to police, asked an officer whether the defendant had "gotten it bagged up"—apparently referring to contraband. (*Id*. at p. 905.) The court admitted the statement as evidence of the officer's state of mind, to explain why he arrested defendant for conspiracy to sell methamphetamine. The Court of Appeal reversed because the officer's state of mind was irrelevant to any disputed issue. (*Id*. at pp. 906-907.) That is also the case here. It was error to admit the hearsay statement of the unidentified Valero customer.

The more difficult question is whether the error was prejudicial. The testimony that defendant was stopped while driving a truck matching the witness's description of the robber's pickup and the direction the witness said the robber was traveling provided a significant link between defendant and the robbery. Nonetheless, after we consider the evidence as a whole, it is not reasonably probable that the jury would have acquitted defendant of robbery had the hearsay testimony been excluded. The prosecution's evidence was strong. Ramos identified defendant minutes after the robbery and said he "looked exactly the same" as the robber, except for the absence of a beard. He identified

the sweatshirt found in defendant's truck as resembling that worn by the robber. The handgun the police seized from defendant also "looks like the exact same handgun" as the gun used in the robbery.

In addition, strong circumstantial evidence corroborated Ramos's identification. Defendant was stopped minutes after the robbery at a location consistent with the distance a vehicle would have travelled in the time that had elapsed. There was a loaded handgun behind the driver's seat, partially concealed under a sweatshirt. Although defendant had both a gun lock and case in his truck, the gun was neither locked nor in its case. A white plastic bag containing around the same amount of money that was stolen, and in similar denominations, was stuffed between the seats of the truck. Fingerprints from defendant's right hand were found on the bag, consistent with Ramos's report that the robber took the bag from him with his right hand.

Certainly there were also weaknesses in the prosecution's case. Ramos described the robber as a white man with facial hair, when he was in fact a clean-shaven Latino with acne. The in-field identification procedure was more suggestive than a lineup would have been. Ramos was not asked to describe the robber's gun at the police station before he identified it, and he was presented with a single gun rather than asked to choose between various guns. The robber held his weapon in his left hand, but several witnesses testified that defendant shoots with his right. Ramos told police the robber wore a gray sweatshirt, but identified an olive sweatshirt as the robber's. Most troubling, the prosecutor's argument hammered on the hearsay evidence that placed the robber in a white pickup truck heading toward the intersection where defendant was apprehended, emphasizing that point no fewer than five times—even though the statement was admitted only for its relevance to provide the officer's reasons for effecting the traffic stop.

Taking all of these weaknesses into account, however, the fact remains that the People's case against defendant was very strong even without the improperly admitted

hearsay. Under the circumstances, taken as a whole, defendant has not shown it to be reasonably probable that the jury would have reached a more favorable verdict if the hearsay statement had been excluded. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

II. *The Showup Was Not Unduly Suggestive*

The defense moved, unsuccessfully, to suppress Ramos's identification of defendant. Defendant contends the ruling was erroneous because the in-field showup was unconstitutionally suggestive and tainted Ramos's subsequent identification of defendant during trial. The law is contrary.

Defendant bears the burden of showing the identification procedure was unreliable. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) "Where the defendant claims the pretrial identification was unnecessarily suggestive, he must show it gave rise to a very substantial likelihood of irreparable misidentification." (*People v. Craig* (1978) 86 Cal.App.3d 905, 913; *Simmons v. United States* (1968) 390 U.S. 377, 384.)

"The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242.) Thus, if we determine that a challenged procedure is not impermissibly suggestive, our inquiry into the due process challenge to a field identification ends. (*People v. Ochoa, supra,* 19 Cal.4th at p. 413.)

The standard of review for a claim of undue suggestiveness remains unsettled (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413). However, we are compelled under any standard of review to conclude that Ramos's identification was properly admitted.

A single person showup is not inherently unfair. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.) Prompt identification of a suspect who has been apprehended close to the time and place of the offense in order to exonerate the innocent and aid in discovering the guilty is a valid purpose for conducting a one-person showup, and its potential unfairness may be offset by the likelihood that a prompt identification shortly after the crime will be more accurate than a belated one. (*People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071-1072.) Thus, numerous in-field identifications have been ruled properly admitted although the sole suspect was in the back of a patrol car, under police guard, and/or handcuffed. (*In re Richard W.* (1979) 91 Cal.App.3d 960, 970; *People v. Craig, supra,* 86 Cal.App.3d 905, 914; *People v. Smith* (1970) 13 Cal.App.3d 897, 909; *People v. Rodriguez* (1970) 10 Cal.App.3d 18, 27-32.)

Here, the in-field showup was conducted within 30 minutes of the robbery and about four miles away. It was therefore justified by the need to have Ramos promptly identify a suspect who was apprehended close in space and time to the crime in order to determine whether he was the perpetrator or, if not, so the police could release him and continue searching for the robber. Although the dispatcher told Ramos that the police thought they had arrested the perpetrator, Sergeant Troutfetter told him he was under no obligation to identify the suspect and instructed him to do so only if he recognized the suspect as the person who robbed him. Ramos testified, and the trial court found, that Ramos did not know the suspect was apprehended with a gun until after Ramos identified him. Although the Sebastopol Police Department was nearby and had the computer capability to create a photographic lineup, the computer was having a lot of problems, could be down for various periods of time, and, since it used driver's license photos,

sometimes produced out-of-date photographs of the suspect. On this record, defendant did not meet his burden of demonstrating the showup procedure was unduly suggestive and unnecessary or that it gave rise to a "very substantial likelihood of irreparable misidentification." (*People v. Craig*, *supra*, 86 Cal.App.3d at p. 913.)

Observing that the practice of displaying suspects individually rather than as part of a lineup has received considerable scholarly and judicial criticism, defendant urges us to depart from the law as stated in *People v. Ochoa*, *supra*, 19 Cal.4th 353. (See, e.g., Lee, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups* (2005) 36 Colum. Human Rights L. Rev. 755, 769; *State v. DuBose* (2005) 285 Wis.2d 143.) He asserts that "police are routinely using showups, often for no other reason than because it is convenient, as in this case, and courts are routinely admitting the showup identifications. The absence of significant judicial restraints on showups has transformed what was intended to be an exceptional procedure into a standard procedure. The routine use of unnecessarily suggestive identifications of a showup is not ameliorated by the routine giving of a police admonition that the witness does not have to identify the suspect as the perpetrator; the issue is suggestibility, not compulsion. The fact that the witness claims to be certain of the identification also adds nothing—the certainty may have been reinforced by the suggestive circumstances. And . . . there is no correlation between certainty and accuracy." Even if these arguments

were supported by the record in this case–which they are not[4]–as an intermediate court of review we are not at liberty to reject the principles stated in *Ochoa.* (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

III. *Sentencing*

Defendant contends the court abused its discretion when it selected the middle term of imprisonment because it relied in part on defendant's denial of responsibility for the crime as an aggravating factor. The People do not dispute that defendant's continued claim of innocence was an improper factor for the court to consider in this case. (See *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319 [lack of remorse may be used as an aggravating factor unless defendant denies guilt and the evidence of guilt is conflicting]; *People v. Key* (1984) 153 Cal.App.3d 888, 900-901 [same].) They assert, however, that defendant waived his right to challenge this alleged error by failing to object or otherwise bring it to the attention of the trial court at sentencing. Assuming for purposes of argument that the court improperly considered defendant's claim of innocence, we agree.

People v. Scott (1994) 9 Cal.4th 331, dispels any uncertainty about the applicability of the waiver doctrine to discretionary sentencing choices. *Scott* holds the doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in

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[4] Faced with a similar request, the New Jersey Supreme Court said much the same thing (albeit more elegantly). "We have no reason to doubt that if defendant had raised these arguments before the trial court and submitted the current research in support of his request for a new standard for determining the admissibility of showup identification, a different record would have been made. The trial court would have received the evidence and made its decision, and the Appellate Division then would have had a full record to review. In that event, the arguments defendant now makes would be properly before us. In the absence of such a record, and in light of our consistent application of federal constitutional precedent in deciding the admissibility of identification evidence, we decline to adopt a new standard under our state constitution." (*State v. Herrera* (N.J. 2006) 187 N.J. 493, 501 [902 A.2d 177, 181].)

which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons. (*Id*. at p. 353.) The court explained: "Our reasoning is practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Ibid*.) In this case, therefore, defendant forfeited the right to contest the court's consideration of his claim of innocence as an aggravating sentencing factor by failing to object to it at sentencing.

We are not persuaded by defendant's argument that this case falls within an exception to *Scott* as stated in *In re Sheena K.* (2007) 40 Cal.4th 875. Under *Sheena K.*, a defendant's failure to object at sentencing does not waive a claim that a probation condition is unconstitutionally vague and overbroad if that claim presents "a pure question of law, easily remediable on appeal by modification of the condition." (*Id.* at p. 888.) Defendant is not challenging a condition of probation, but the trial court's choice of the middle term of imprisonment. Moreover, *Sheena K.* cautions that not all " 'constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, *"[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court*." ' " (*Id*. at p. 889, italics added.) Here, because the sentence was the result of the court's discretionary weighing of multiple sentencing factors, it neither presents a pure question of law nor is "easily remediable on appeal by modification" of the

sentence. This case, therefore, is governed by the general rule of forfeiture, not the *Sheena K.* exception.

Defendant alternatively asserts that defense counsel's failure to object constituted constitutionally ineffective assistance. We are not persuaded. To prevail, defendant must show both (1) that counsel's performance fell below a standard of reasonable competence, and (2) that counsel's shortcomings resulted in prejudice. (*People v. Anderson* (2001) 25 Cal.4th 543, 569; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) If we assume that counsel performed ineffectively at sentencing, defendant has not shown it is reasonably probable the court would have chosen the mitigated term had counsel raised a timely objection. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688.)

The probation report cited five aggravating factors: (1) the crime involved the threat of great bodily harm indicating a high degree of callousness; (2) the manner in which the crime was carried out indicated planning; (3) the offense involved violent conduct indicating a serious danger to society; (4) defendant was on probation at the time; and (5) his prior performance on probation was unsatisfactory. The probation officer cited only one mitigating factor: defendant's prior performance on probation in a different county was satisfactory.

At the sentencing hearing, the court said it was troubled "[t]hat there has been no acknowledgment of any kind that there's any responsibility for the crime. I think the mid term is appropriate." The court then stated its reasons for selecting the mid term as follows: "[T]here was planning and sophistication. This was an opportunistic crime. You tried to conceal your identity by using a hooded sweatshirt. You continue to deny involvement in the crime. And you even, to the probation officer, expressed great surprise at the jury's verdict, and there's no showing of remorse for your conduct. There's no compassion of any kind, or acknowledgment that the victim had the wits scared out of him in this matter. And so your conduct in the, as regards the event that

was in this courtroom shows that you were dangerous, you are dangerous to society, and you aren't taking any responsibility or showing any remorse for your conduct."

As for mitigating factors, the court noted: "I do also find that you have a very minor history prior to this event: The drunk driving, a hit and run, and there was something about a joy riding charge. . . as a juvenile matter. So those factors are, the Court considers to be mitigating, as well as the fact that, once you were apprehended, you were, you've been entirely cooperative with the deputies on the scene and the process, and you've been respectful here, and, and I consider those to be mitigating factors. You also have performed satisfactorily on probation, on the matters that you've been on probation. . . . [¶] Also [a] mitigating factor is that you have a very supportive family, and you have a wife and children who are supportive of you."

"In order to determine whether error by the trial court in relying upon improper factors in aggravation requires remanding for resentencing 'the reviewing court must determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' " (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) That is, "a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price, supra,* 1 Cal.4th at p. 492.) "A case will not be remanded for resentencing based on the use of an invalid factor if the superior court's remarks indicate a strong belief that the upper term was proper and other valid factors were mentioned." (*People v. Clark* (1992) 12 Cal.App.4th 663, 667.)

The court here considered valid factors, including defendant's dangerousness to society and the planning and sophistication involved in the crime, that could justify imposition of the mid-term sentence. It expressed its choice of the middle term in no uncertain terms despite its acknowledgment of mitigating factors. On this record we cannot find it reasonably probable that the court would have chosen the mitigated term had it not also considered defendant's continued denial of guilt. "The reviewing court

cannot substitute its reasons for those omitted or misapplied by the trial court, nor can it reweigh valid factors bearing on the decision below." (*People v. Scott, supra,* 9 Cal.4th at p. 355.)

DISPOSITION

The judgment is affirmed.

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Siggins, J.

I concur:

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Jenkins, J.

POLLAK, Acting P.J., Concurring.—I join sections II and III of the Discussion in the majority opinion. I concur in the result in section I, concerning the admission of the hearsay statement made by the unidentified Valero customer to Robert Ramos.

I agree with the majority that there was no proper nonhearsay purpose for which the statement was admissible. I have some misgivings as to the conclusion that the admission of the statement, if erroneous, was harmless, but I do not reach that question because, in my view, the statement was properly admissible as a spontaneous declaration under Evidence Code section 1240. (*People v. Gutierrez* (2000) 78 Cal.App.4th 170.) Although here, unlike the closely comparable situation in *Gutierrez*, there was no testimony that the declarant was nervous or agitated, satisfying the requirement that the statement has been made "spontaneously while the declarant was under the stress of excitement caused by" the events he perceived (§ 1240, subd. (b)), under the circumstances he could hardly have been otherwise. The testimony establishes that the customer entered the office of the gas station when it was apparent that a robbery had just occurred and the culprit was in the process of fleeing. There was neither time nor reason for the customer to fabricate his hurried statement, when asked if he had seen which way the robber went, that he drove off in a white half ton, pointing south on Highway 16. This was sufficient, in my view, to show that "the declarant's statement was made while nervous excitement still dominated his mental processes." (*Gutierrez, supra*, at p. 180.)

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Pollak, Acting P.J.